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11 **UNITED STATES DISTRICT COURT**
 12 **DISTRICT OF NEVADA**

13 NML CAPITAL LTD.,
 14 Plaintiff,
 15 v.
 16 THE REPUBLIC OF ARGENTINA,
 17 Defendant.

CASE NO.: 2:14-cv-00492-RFB-VCF

**NML CAPITAL, LTD.'S LIMITED
 RESPONSE TO JORGE LANATA AND
 THE CENTER FOR JOURNALISM'S
 MOTION TO INTERVENE TO UNSEAL
 PORTIONS OF THE RECORD (DKT. #67)**

20 Plaintiff NML Capital, Ltd. ("NML"), by and through its attorneys of record Brownstein
 21 Hyatt Farber Schreck, LLP, and Dechert, LLP, hereby submits this Limited Response to Jorge
 22 Lanata and the Center For Journalism's (collectively referred to as "Lanata") Motion to Intervene
 23 to Unseal Portions of the Record (Dkt. #67) ("Motion to Intervene").

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. INTRODUCTION**

26 Lanata's Motion to Intervene paints the picture of the relief he seeks with a broad stroke,
 27 rather than with the narrowly tailored precision one should employ when asking the Court to
 28 intervene into an action it has no stake in. To be clear, the primary legal position set forth in the

1 Motion to Intervene supports intervening as of right, rather than what Lanata is in a position to
 2 do, which is to seek to intervene for the *limited* purpose of requesting the Court to enter an order
 3 unsealing the deposition testimony of Patricia Amunategui (the "Transcript"). In doing so, Lanata
 4 seems to be arguing that he is entitled to become a party to this action and, therefore, should be
 5 provided with "*all* court records and evidence in support of those documents", including
 6 discovery not filed with the Court. This request goes beyond the public's right to access court
 7 records, and is not supported by any authority relied upon by Lanata. To the extent Lanata seeks
 8 such relief, NML opposes the Motion to Intervene.

9 Lanata has, however, misstated NML's position on the sealing or unsealing of the
 10 Transcript and other documentation MF Nevada and/or Ms. Amunategui has designated as
 11 "Confidential". NML has **never** taken the position that the Transcript and any other documents
 12 are confidential or that sealing the same is necessary in light of some interest NML has in keeping
 13 them confidential. Rather, NML has maintained the position that it is obligated under the
 14 Protective Order¹ entered by this Court to seek leave of Court to file those documents under seal
 15 due to MF Nevada and Ms. Amunategui's designation of the documents as "Confidential".
 16 Additionally, NML has simply provided the Court with MF Nevada and Ms. Amunategui's
 17 representations regarding the nature of the Transcript and other documents, and has not conceded
 18 that those representations are accurate and/or truthful.

19 Lanata fails to recognize NML's position and, instead, misdirects his complaints towards
 20 NML throughout his argument. NML's position remains unchanged—Ms. Amunategui and MF
 21 Nevada designated the Transcript as "Confidential" and bear the burden of establishing "good
 22 cause" to keep it sealed. For its part, NML only sought to file the documents under seal to
 23 comply with its obligations under the Protective Order. Accordingly, NML will sit in the stands
 24 while the appropriate parties hash out whether the Transcript and other documents should remain
 25 sealed.

26
 27 ¹ Capitalized terms herein bear the same meaning as provided in the Motion for Leave to File Under Seal the
 28 Memorandum in Response to Non-Party MF Corporate Services (Nevada) Limited's Motion to Quash Subpoena
 and/or for Protective Order; and in Support of NML's Motion to Compel and Exhibits "A" and "H" Thereto (Dkt.
#61.)

1 **II. DISCUSSION**

2 **A. To The Extent Lanata Seeks Intervention For The Limited Purpose Of**
 3 **Challenging The Confidential Designation Of The Transcript, NML Does Not**
 4 **Oppose Such A Request – Any Additional Relief Requested Should Be**
 5 **Denied.**

6 **1. Lanata does not satisfy the requirements to intervene by right.**

7 Lanata's position is unclear. While Lanata sets forth the correct legal authority regarding
 8 intervention by right, Lanata cannot establish that he is entitled to such relief. Indeed, it appears
 9 from his analysis, that he truly only seeks to intervene for a limited purpose. Thus, the Court
 10 should not grant Lanata's request to intervene as of right under Federal Rule of Civil Procedure
 11 24(a).

12 Rule 24(a) permits intervention as of right, and the applicant bears the burden of
 13 establishing that it satisfies four requirements:

14 (1) the applicant must timely move to intervene; (2) the applicant must
 15 have a significantly protectable interest relating to the property or
 16 transaction that is the subject of the action; (3) the applicant must be
 17 situated such that the disposition of the action may impair or impede the
 18 party's ability to protect that interest; and (4) the applicant's interest must
 19 not be adequately represented by existing parties.

20 *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (citation omitted). As demonstrated
 21 below, Lanata has failed to satisfy these requirements.

22 First, Lanata's Motion to Intervene was filed on December 5, 2014, a week before the
 23 hearing on the requests to file under seal. (*See* Dkt. #67.) As the Motion to Intervene was not
 24 filed on an emergency basis, the briefing schedule provides for responses due on December 22,
 25 2014, *after* the hearing on the seal motions. (*See id.*) Arguably, therefore, the request is not
 26 timely.

27 Second, Lanata does not have "a significantly protectable interest relating to the property
 28 or transaction that is the subject of the action", as required for intervention as of right. *See*
Arakaki, 324 F.3d at 1083. Although Lanata claims to have a "significantly protectable interest in
 the case," in his discussion of this requirement, he only argues that he has an interest in *access* to

1 the Court documents in this action. (*See* Dkt. #67, at 2:13-18.) (emphasis added). To be clear,
 2 Lanata does not, because he cannot, argue that he has an interest in the money NML seeks to
 3 collect via the subpoenas issued which initiated these proceedings, *i.e.* the property that is the
 4 subject of this action. (*See id.*) Rather, he asserts that he has an interest in providing the public
 5 with information regarding the action. (*See id.*, at 2:14-18.) Accordingly, Lanata has only
 6 purported to demonstrate an interest in the right to access the documents filed in this action, and
 7 not an interest in the case. Lanata has not satisfied the second requirement.

8 Third, the Motion to Intervene does not demonstrate that "disposition of the *action* may
 9 impair or impede" Lanata's ability to protect his purported interest—that if the Court grants or
 10 denies the pending motions regarding the production of documents, Lanata's interest will
 11 somehow be impeded upon. (*Id.* at 2:18-23.) Rather, Lanata argues that if he is not permitted to
 12 intervene and gain access to public documents, he will not be able to "perform [his] Fourth Estate
 13 function." (*See id.*) Consequently, Lanata has failed to meet the third requirement of intervention
 14 as of right.

15 Fourth, and finally, Lanata's discussion regarding whether his interests are adequately
 16 represented misrepresents NML's position. Lanata asserts that "as both NML and Ms.
 17 Amunategui have sought to keep this deposition testimony from the public," his interests "are not
 18 represented at this time." (*Id.* at 2:23-25.) NML has not sought to maintain the confidentiality of
 19 the Transcript. In each of NML's requests, it has consistently held the position that it is
 20 requesting to file the Transcript under seal to fulfill its obligation under the Protective Order, and
 21 that it does not take a position regarding whether the Transcript was properly designated
 22 "Confidential" and should remain sealed. (*See* Section II(B)(1), *infra*.) Therefore, while NML
 23 is not advocating for the Transcript to be disclosed, it is not, as Lanata suggests, moving the Court
 24 for an order keeping the Transcript sealed. Beyond this mischaracterization, Lanata is correct in
 25 its assertion that there is not a party in the action taking the position it seeks to take.

26 As Lanata has failed to satisfy all four of the requirements for intervention as of right, the
 27 Court should deny his request in this respect. It is important to note, additionally, that if the Court
 28 finds that Lanata is entitled to intervene as of right, and is inclined to permit the same, Lanata has

1 not cited any authority supporting a finding that he should be provided with access to the
 2 discovery materials not filed with the Court. Therefore, the Court should not permit the same.

3 **2. *The Court allows permissive intervention where a party seeks***
 4 ***intervention for the limited purpose of challenging a protective***
 5 ***order, and, if anything, Lanata should only be allowed to***
 intervene for this limited purpose.

6 Lanata acknowledges that this Court has allowed intervention in situations such as these,
 7 where the party seeks to intervene for the limited purpose of challenging a protective order. What
 8 Lanata fails to recognize, however, is that the proper relief to seek is *permissive* intervention, and
 9 that the Court's analysis is quite different in such circumstances. Regardless, NML does not take
 10 a position as to whether Lanata should be permitted to intervene under these circumstances, but
 11 stands by its previous position that intervention as of right is not appropriate.

12 Lanata cites the Court's decision in *FTC v. AMG Servs.*, 2014 U.S. Dist. LEXIS 160531,
 13 at *8 (D. Nev. Nov. 13, 2014), for the proposition that "courts have routinely allowed the media
 14 to intervene in civil cases for the limited purpose of challenging protective or confidentiality
 15 orders". (*See* Dkt. #67, 3:3-10.) While Lanata's discussion ends there, the Court's decision went
 16 a step further. (*See id.*) The Court further explained that a *permissive* intervention, rather than
 17 intervention as of right, is the proper relief, and that such an inquiry involves the Court engaging
 18 in more of a discretionary consideration of the grounds for sealing. *See FTC*, 2014 U.S. Dist.
 19 LEXIS 160531, at *9.

20 In such a situation, the Court considers whether "intervention will unduly delay or
 21 prejudice the adjudication of the original parties' rights" and "whether disclosure will cause
 22 "annoyance, embarrassment, oppression, or undue burden or expense." *Id.* With regard to the
 23 first prong, the Court starts with two presumptions: (i) "a strong presumption in favor of access,"
 24 *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995), and (ii) the "broad right of discovery"
 25 and presumption that a litigant is entitled to "every man's evidence," *Shoen v. Shoen*, 5 F.3d
 26 1289, 1292 (9th Cir. 1993). *Id.* at *9-11. Second, the Court considers "whether these
 27 presumptions have been rebutted." *Id.* at *11. As this analysis involves significant
 28 considerations regarding the grounds to seal the Transcript, a dispute that NML does not have a

1 stake in (discussed herein), it will not engage in a discussion regarding the same. NML will
 2 simply represent to the Court that Lanata has not demonstrated that it should be permitted to
 3 intervene as a right, and that if the Court is inclined to permit intervention, it should do so only
 4 for the *limited* purpose of Lanata addressing the Transcript's designation as "Confidential," *i.e.*
 5 permissive intervention. Additionally, NML notes that it strongly opposes any request that
 6 Lanata be provided with access to materials not filed with this Court.

7 **B. Lanata's Discussion Regarding Sealing The Transcript Misstates NML's**
Position And Asks The Court To Employ The Incorrect Standard.

8 **1. *NML has always maintained its position that it sought leave of***
Court to file the Transcript under seal in light of its obligations
under the Protective Order.

10 NML has consistently maintained the position that it does not have a "dog in the fight" as
 11 to whether the Transcript or other documents remain sealed or are revealed to the public. This is
 12 the position NML still retains herein. In contrast, Ms. Amunategui and MF Nevada have sought
 13 to keep the Transcript sealed. (*See* Dkt. #64; *see also* Case No. 2:14-cv-01573-RFB-VCF
 14 ("Argentina II"), Dkt. #21.) Despite this, throughout Lanata's Motion to Intervene, he postures
 15 himself against NML with respect to the request to seal, and represents to the Court that NML is
 16 seeking an order sealing the Transcript out of its desire for the same. Lanata's positon is not
 17 accurate and is worth addressing herein.

18 As is abundantly clear from a review of NML's Revised Motion for Leave to File Under
 19 Seal ("Motion to Seal") cited to by Lanata, NML has not sought to keep the Transcript under seal
 20 in light of its own desire to keep the public from viewing the document. (Dkt. #56.)² Rather, as
 21 is stated in the Motion to Seal, "[o]ut of an abundance of caution and in an effort to comply with
 22 its discovery obligations under the Protective Order entered in [this action]," NML redacted
 23 references to the Transcript, withheld the Transcript prior to filing, and sought leave to file the
 24 same under seal. (*See* Dkt. #56, at 3:26-4:8.) Notably, NML stressed to the Court that it "does

27 ² NML notes that Lanata cites to Dkt. #56 when referencing NML's Motion to Seal. (*See* Dkt. #67, at 12:8.)
 28 The Motion to Seal, however, was inadvertently filed in the above captioned action at Dkt. #56, but was subsequently
 filed in the related matter, Argentina II, and the image corrected by the Court. (*See* October 31, 2014, Court Clerk
 entry; *see also* Argentina II, at Dkt. #22.)

1 not concede that the Transcript is properly marked "CONFIDENTIAL", and reserves the right to
 2 have it de-designated as provided for in the Protective Order." (*Id.* at 3-4, n.1.)

3 In contrast, in MF Nevada and Ms. Amunategui's seal motions filed in this matter, they
 4 specifically ask "the Court to seal the records pertaining to Ms. Amunategui's Deposition," and
 5 argue that "'Good Cause' Exists to Seal the Deposition Testimony," "Ms. Amunategui Will Be
 6 Irreparably Harmed By Exposure of the Deposition Testimony," and that "MF Nevada Will Be
 7 Irreparably Harmed by Exposure of the Deposition Testimony." (Argentina II, Dkt. #21; *see also*
 8 Dkt. #64.) Thus, despite what Lanata argues, NML is not the party seeking to maintain the
 9 confidentiality of the Transcript and is not the party who bears the burden of establishing "good
 10 cause" to do so. Rather, Ms. Amunategui and MF Nevada bear that burden and have moved the
 11 Court in this matter and in Argentina II for such relief. (*See* Argentina II, Dkt. #21; *see also* Dkt.
 12 #64.) Lanata's claims to the contrary should be disregarded.

13 **2. *Despite the fact that NML does not take a position on whether***
 14 ***the Transcript should remain sealed, it must note that Lanata asks the***
 Court to employ the incorrect standard.

15 Although NML does not take a position on whether the Transcript should remain sealed, it
 16 is constrained to reiterate the standard for sealing documents filed with the court. The Ninth
 17 Circuit Court of Appeals in *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th
 18 Cir. 2006), clearly articulated the appropriate showing a party must make when seeking to file
 19 under seal: "'[C]ompelling reasons' must be shown to seal judicial records attached to a
 20 dispositive motion," and "[a] 'good cause' showing under Rule 26(c) will suffice to keep sealed
 21 records attached to nondispositive motions." (citations omitted.) The Transcript at issue is
 22 attached to and/or referenced in non-dispositive briefs, *i.e.* responses to motions to quash
 23 subpoenas (*see* Argentina II, Dkt. 8; *see also* Dkt. #59), cross-motions to compel (*see* Argentina II, Dkt.
 24 10; *see also* Dkt. #60), and replies in support of motions to compel (*see* Argentina II, Dkt.
 25 27; *see also* Dkt. 66). Lanata even admits that "this is not a dispositive motion." (Dkt. #67, at
 26 11:1-2.) Nonetheless, Lanata asks the Court to apply the compelling reasons standard. (*See id.*)

27 Lanata supports this argument by asserting that the Transcript "is central to the merits of
 28 the underlying action" and "imperative to the outcome of this case," and that "it could not be

1 seriously argued that her testimony could possibly be 'unrelated' or 'only tangentially related.'"
 2 (*Id.* at 11:10-16.) Further, Lanata makes the argument that even though the Transcript "has not
 3 yet been attached as an exhibit in support of a **dispositive** motion, it presumably will be, in the
 4 future, and no motion of any importance could be filed in this case without it." (*Id.* at 11:17-20.)
 5 These assertions are wholly without merit.

6 Starting with the most obvious flaw, Lanata provides no authority for his position that a
 7 mere (speculative) possibility that a document may be attached to a dispositive motion in the
 8 *future* somehow transforms a non-dispositive motion into a dispositive motion for purposes of
 9 determining the correct standard in a motion to seal. (*See generally*, Dkt. 67.) What's more, the
 10 above captioned action and Argentina II are not "the underlying action[s]" in this matter, rather
 11 the actions were initiated due to NML serving Subpoenas on entities in an attempt to collect a
 12 judgment in a New York action. (*See* Dkt. #1; *see also* Argentina, Dkts. #8 & #10.) As the court
 13 held in *Kamakana*:

14 [T]he strong presumption of access to judicial records applies fully to dispositive
 15 pleadings, including motions for summary judgment and related attachments. We
 16 adopted this principle of disclosure because the resolution of a dispute on the
 17 merits, whether by trial or summary judgment, is at the heart of the interest in
 ensuring the "public's understanding of the judicial process and of significant
 public events."

18 *Kamakana*, 447 F.3d at 1179 (citations omitted). The resolution of the pending motions before
 19 the Court, wherein the Transcript is referenced and/or attached, will not result in a resolution of
 20 the "dispute on the merits"; rather, it will result in a determination of whether NML is permitted
 21 to discover documents/information related its judgments against the Republic of Argentina.
 22 Accordingly, Lanata's attempt to persuade the Court that the "compelling reasons" standard is the
 23 appropriate standard fails.

III. CONCLUSION

Based on the foregoing, NML respectfully requests the Court deny Lanata's Motion to Intervene to the extent that he requests to intervene as of right and be provided access to all Court documents, including discovery not filed with the Court.

DATED this 12th day of December 2014.

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CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that on the 12th day of December, 2014, I caused a true and correct copy of **NML CAPITAL, LTD.'S RESPONSE TO JORGE LANATA AND THE CENTER FOR JOURNALISM'S MOTION TO INTERVENE TO UNSEAL PORTIONS OF THE RECORD (DKT. #67)** was served via electronic service to all electronic registered CM/ECF users in this matter.

/s/ Paula Kay
an employee of Brownstein Hyatt Farber Schreck, LLP